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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

TURN DOWN THE LIGHTS, Plaintiff and Respondent, v. CITY OF MONTEREY, Defendant and Appellant.	H044656 & H045556 (Monterey County Super. Ct. No. M116731)

Defendant City of Monterey appeals the trial court's decision to grant plaintiff Turn Down the Lights's petition for writ of mandate on the city's determination that its project to replace high-pressure sodium lightbulbs with LED light fixtures in street lights is categorically exempt from environmental review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq. Unspecified statutory references are to this Code.) The city also appeals the trial court's post-judgment award of attorney's fees on the sole basis that if the judgment is reversed plaintiff will no longer be a successful party. The merits appeal presents two main questions: Whether on this record plaintiff was required to exhaust administrative remedies in order to challenge the city's project approval in court, and whether the city's categorical exemption determination is supported by sufficient evidence in the record. As we will explain, we do not reach the latter issue because plaintiff failed to exhaust administrative remedies by not objecting to the project before the City Council approved it. We will therefore reverse the judgment and the separate order awarding attorney's fees.

I. CITY COUNCIL AND TRIAL COURT PROCEEDINGS

A. PROJECT APPROVAL AND IMPLEMENTATION

The agenda for a November 2011 meeting of the Monterey City Council included the following item: "Award Street and Tunnel Lighting Replacement Project Contract ***CIP*** (Plans & Public Works - 405-04)." A three-page staff report for that agenda item describes the project as involving "removal of existing high-pressure-sodium street light and tunnel light fixtures, and installation of new LED street light fixtures and new induction tunnel fixtures." The replacement light fixtures were described as "energy efficient upgrades." The report acknowledges that the "light output of new energy efficient [LED] streetlights will result in a light that is more white than yellow," but stated that the LED lights "have the advantage of dispersing the light in a more controllable manner than the current lights." A section in the report entitled "Environmental Determination" states: "The City's Planning, Engineering, and Environmental Compliance Division determined that this project is exempt from CEQA regulations under Article 19, Section 15302." (Capitalization and bold omitted.)

At the City Council meeting where the contract was considered, a presentation by city staff described the project to replace existing street lights with LED street lights and explained the project's funding sources and anticipated energy savings. The item was opened for public comment, and no member of the public commented. The City Council approved the contract with Republic ITS, Inc. by resolution.

After the city began to install the LED light fixtures, it received complaints about the brightness of the new fixtures. The city also received positive comments, including one from the police department about improved visibility from the amount and color of light produced by the LED fixtures.

B. NOTICE OF EXEMPTION AND LAWSUIT

The city filed a Notice of Exemption, citing the categorical exemption in CEQA Guidelines section 15302 for "replacement or reconstruction of existing structures and

facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced." (The CEQA Guidelines are found at California Code of Regulations, title 14, section 15000, et seq. References to "Guidelines" are to those regulations.) Plaintiff challenged the categorical exemption determination by petition for writ of mandate in the trial court. The trial court granted plaintiff's motion to augment the record to add correspondence and other information the city had not included in the administrative record it certified. (A different panel of this court denied the city's writ petition challenging that trial court decision. (*City of Monterey v. Superior Court* (Oct. 23, 2014, H040365).))

The trial court granted plaintiff's mandamus petition via written decision after briefing and a hearing. The court concluded the project was not exempt under Guidelines section 15302, reasoning that "new LED bulbs and light fixtures are neither a structure nor a facility, by any reasonable definition of these terms." The trial court also excused plaintiff from the duty to exhaust administrative remedies, finding that "the exhaustion requirement does not apply because the City did not provide the 'notice required by law.' " The trial court ultimately granted plaintiff's request for attorney's fees under Code of Civil Procedure section 1021.5, awarding $289,908 in fees and $1,963 in costs.

II. DISCUSSION

The city argues the judgment must be reversed because plaintiff failed to exhaust administrative remedies or, alternatively, because the project is categorically exempt from CEQA. (Citing § 21177.) The city further argues that the attorney's fee award must be reversed because plaintiff should not have prevailed below.

A. PLAINTIFF DID NOT EXHAUST ADMINISTRATIVE REMEDIES

Plaintiff contends that the duty to exhaust administrative remedies was never triggered. As it is undisputed that plaintiff did not object to the project before the City Council approved the contract, the only question is a legal one: whether the reference to

CEQA in the supporting three-page staff report without reference to CEQA on the City Council agenda was adequate notice to trigger the duty to exhaust administrative remedies. (See *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291 (*Tomlinson*) [exhaustion requirement applies to categorical exemption determinations "as long as the public agency gives notice of the ground for its exemption determination"].)

Section 21177, subdivision (a) sets forth the general rule for exhaustion of administrative remedies under CEQA: "An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." Section 21177, subdivision (e) provides an exception: "This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." A main purpose of the exhaustion requirement is to ensure that courts have a complete record drawing on administrative expertise. (*Tomlinson*, 54 Cal.4th at p. 291.) It serves as a preliminary administrative sifting process that brings to light relevant evidence a court may then review. (*Ibid.*)

The Supreme Court discussed section 21177 as it applies to categorical exemption determinations in *Tomlinson*, *supra*, 54 Cal.4th 281. There, a county planning department sent written notice of a proposed residential subdivision project to agencies, neighbors, and interested parties, and a later notice of the planning commission meeting at which the project would be considered; each notice stated the project was exempt from CEQA as in-fill development. (*Id.* at p. 287.) Tomlinson and others attended the planning commission hearing and argued that the project was not exempt from CEQA. (*Id.* at pp. 287–288.) When they challenged approval of the project in court, they raised a

new argument about why the project was not exempt. That trial court found the plaintiffs had failed to exhaust their administrative remedies as to the new argument, but the Court of Appeal reversed, finding no duty to exhaust administrative remedies in categorical exemption cases as a matter of law. (*Id.* at pp. 288–289.) The Supreme Court concluded that whether a duty to exhaust is triggered in a categorical exemption case must be decided on a case-by-case basis. Under *Tomlinson*, "the exhaustion-of-administrative-remedies requirement set forth in subdivision (a) of section 21177 applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency *gives notice of the ground for its exemption determination*, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Tomlinson*, at p. 291, italics added.)

Plaintiff argues that its duty to exhaust administrative remedies was never triggered because: CEQA was not referenced on the face of the City Council agenda; the agenda "does not disclose that LED streetlights would be installed citywide including in the historic districts"; the staff report did not explain why the Guidelines section it referenced applied; and the collective effect of those deficiencies is that the hearing on the project did not qualify as an "opportunity for members of the public to raise those objections orally." (§ 21177, subd. (e).) We do not read *Tomlinson* as requiring that notice of a CEQA determination be given on the meeting agenda as opposed to in an accompanying staff report, nor does *Tomlinson* mandate that any notice identify both an exemption *and* the reasoning for applying the exemption.

The agenda description here informed the public that the city was planning to "Award [a] Street and Tunnel Lighting Replacement Project Contract." We find the description sufficient to prompt residents concerned about the environmental effects of artificial lighting to investigate further by contacting city staff, reading the staff report, or attending the City Council meeting. A member of the public accessing the staff report

would have found its CEQA discussion with relative ease. The staff report was three pages long, and it unambiguously stated (under the section heading "Environmental Determination" in bold font and all caps) that the project was exempt from CEQA under Guidelines section 15302. We conclude on the facts of this case that notice of a claimed CEQA exemption was adequate under *Tomlinson* to trigger plaintiff's duty to exhaust administrative remedies.

Our opinion should not be interpreted as broadly concluding that CEQA need never be mentioned on a meeting agenda. Under a different set of facts, an agenda reference to CEQA might be necessary. But *Tomlinson* advised courts to employ a case-by-case approach to determine whether the exhaustion requirement was triggered. It would be a significant expansion of that decision to require a reference to CEQA on the face of the agenda whenever a CEQA exemption is considered. As we have explained, the agenda description and staff report here, read together, provided adequate notice of the nature of the project and the exemption determination, such that the City Council meeting provided an "opportunity for members of the public to raise ... objections orally or in writing" before the project was approved, as required by section 21177, subdivision (e). We therefore do not reach plaintiff's alternative argument that the City Council meeting was not a "public hearing" under that section.

Plaintiff cites *Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 583–584 (*Defend Our Waterfront*). The project in that case was a land exchange that would transfer one property out of the public trust and replace it with a different parcel to allow the first property to be developed. (*Id.* at p. 575.) The State Lands Commission (the agency with authority to approve the land exchange) placed the land exchange agreement on its agenda for a public hearing. The agenda described the land exchange but did not reference CEQA. (*Id.* at p. 578.) Seven days before the hearing, the State Lands Commission added to its online agenda a staff report accessible via hyperlink; that staff report included a recommended finding that the project was

exempt from CEQA under Guidelines section 15061. (*Defend Our Waterfront*, at p. 578.) The State Lands Commission approved the land exchange and later filed a notice of exemption. (*Id.* at p. 579.) A citizens group challenged the decision by petition for writ of mandate, which the court granted after finding no requirement to exhaust administrative remedies because "there was no effective notice of a public hearing on a CEQA matter" prior to the State Lands Commission hearing. (*Id.* at p. 580.)

Affirming the decision on appeal, the *Defend Our Waterfront* court reasoned that because CEQA provides no formal public comment period preceding an agency's exemption determination, "in order for appellants to prevail on their claim that respondent failed to exhaust its remedy by raising their CEQA objection at a public hearing, [section 21177] subdivision (e) requires that the public hearing affording that opportunity be properly noticed." (*Defend Our Waterfront*, *supra*, 240 Cal.App.4th at p. 583.) The State Lands Commission had argued that because CEQA does not require a noticed hearing before an agency invokes an exemption, the only applicable notice statute was Government Code section 11125, subdivision (a), which requires state bodies like the State Lands Commission to post notice of a meeting online at least 10 days before the meeting. (*Defend Our Waterfront*, at p. 583.) The court concluded that the agency's agenda did not provide notice that the agency was considering an exemption because the agenda made no reference to CEQA. The State Lands Commission alternatively argued that the reference to CEQA in the staff report was adequate to satisfy Government Code section 11125, but the court disagreed because a member of the public "would have to take the additional steps of accessing and reviewing the report in order to learn that a CEQA issue would be decided." (*Defend Our Waterfront*, at p. 584.) Significantly, the court found the staff report could not provide statutorily adequate notice because the hyperlink to the report was not timely added to the agenda 10 days before the hearing. (*Ibid.*.) In contrast, there is no assertion here that the city's staff report was not timely available. To the extent *Defend Our Waterfront* interpreted *Tomlinson* to require a

reference to CEQA on the face of the agenda whenever a CEQA exemption is considered, we note that *Tomlinson* did not state such notice is required and we decline to adopt a broader interpretation.

Plaintiff points to projects where greater notice has been provided, including the city's own consideration of a negative declaration for a plastic bag ban and the mitigated negative declaration at issue in *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177–1178 & 1177, fn. 13. But those examples do not inform the result here because CEQA prescribes the notice to be given for projects being approved with a negative declaration. (§§ 21080, subds. (c) & (d); 21092, subd. (a) ["A lead agency that is preparing ... a negative declaration ... shall provide public notice of that fact within a reasonable period of time prior to ... adoption of the negative declaration"]; *id.* at subd. (b)(3)(A) [negative declaration notice must be published in newspapers].) For a project that an agency views as exempt entirely from CEQA, the only potential notice necessary to trigger the duty to exhaust administrative remedies is that discussed in *Tomlinson*, namely notice of the ground for the agency's exemption determination and a hearing or other opportunity for members of the public to raise objections. (*Tomlinson*, *supra*, 54 Cal.4th at p. 291.)

Plaintiff also relies on *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1144 & 1150, disapproved on other grounds by *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2, where a different panel of this court concluded that no exhaustion requirement was triggered where the notice of exemption for a project to purchase property contaminated with toxic substances omitted any reference to the property's contaminated status. We see no similar material omission in the agenda and staff report the city provided here. The City Council agenda alerted the public to the nature of the lighting project and the three-page staff report discussed both the proposed use of LED lights and a claimed CEQA exemption.

Plaintiff notes various methods the city could have used to provide greater notice to the public about the project. Plaintiff suggests the city could have mailed notices to city residents, or included references on the City Council meeting agenda to CEQA, LED street lights, and the price of the contract. We readily acknowledge that some or all of those approaches might have led to greater public engagement. But we are not tasked as an intermediate court with determining the ideal. We conclude that neither section 21177 nor *Tomlinson* requires greater notice than the city provided to trigger the need to exhaust administrative remedies.

Plaintiff's final argument is that a public interest exception to the exhaustion requirement should apply here. The concept originated in *Environmental Law Fund, Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105 (*Environmental Law Fund*), where the court concluded that the "failure of a private person to exhaust an administrative remedy, against governmental action taken in an administrative proceeding to which he was not a party, does not bar him from seeking judicial relief from such action by way of enforcing rights which he holds as a member of the affected public." (*Id.* at p. 114.) The Supreme Court has never affirmed the validity of a public interest exception, and it has not been codified in the Public Resources Code. (See *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417–418 [declining to "pass on the validity" of the public interest exception from the *Environmental Law Fund* decision because the case at issue was factually distinguishable].) We are not persuaded that the public interest demands an exception to the exhaustion requirement under the circumstances presented here.

Given our conclusion that plaintiff was required to exhaust administrative remedies but did not do so, we do not reach the issue of whether the record supports application of the categorical exemption in Guidelines section 15302. We also do not reach the city's argument that the trial court erred by allowing plaintiff to augment the record with materials that were not before the City Council when it approved the project.

B. THE ATTORNEY'S FEE AWARD MUST BE REVERSED

"Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest." (Code Civ. Proc., § 1021.5.) As we have concluded that the judgment must be reversed, plaintiff is no longer a successful party and the fee award must be reversed.

III. DISPOSITION

The judgment and separate order granting plaintiff's request for attorney's fees are reversed. Each party is to bear its own costs on appeal.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Danner, J.